Federal Court  Cour fédérale

Date: 20161019

Docket: T-1662-16

Citation: 2016 FC 1166

Ottawa, Ontario, October 19, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

YU CHUN ANTHONY WONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Background Facts and Submissions

[1] This is a motion made by the Applicant, Mr. Wong, for an interim order enjoining the Governor in Council [GIC] from rendering a decision on his citizenship revocation until such time as the underlying application for leave and judicial review has been finally decided. That application seeks: (1) a declaration that the delay in processing Mr. Wong's citizenship

revocation is an abuse of process; and (2) a declaration that the proper remedy for the delay is an order enjoining the GIC from rendering a decision in Mr. Wong's case.

[2] Mr. Wong applied for Canadian citizenship in 2001. In 2002, he was charged with five indictable offences involving rock cocaine. He was convicted of the charges in 2003 and received a conditional sentence of 18 months. In July 2002, before his convictions but after being charged, he wrote the citizenship test. He did not accurately answer a question on that test about criminal charges or convictions. He also did not inform the Minister about his charges prior to receiving citizenship. He now says that was because his English was poor and as he was presumed innocent, he did not have to answer in the affirmative regarding his charges. By operation of section 22 of the *Citizenship Act*, RSC 1985, c C-29, as it then read, he should not have been granted citizenship while the charges were pending or for at least three years after his conviction. Nonetheless, in October 2002, he obtained his citizenship.

[3] In April 2006, Mr. Wong was convicted of one count of false representation under the *Citizenship Act* and was fined $500 because of his false answer. The lawyer he retained at that time told Mr. Wong further action could occur with respect to his citizenship. From then on, Mr. Wong has been concerned about losing his citizenship: he did not travel, even to see his dying grandmother in Hong Kong, because he feared his citizenship would be revoked.

[4] In June 2012, Citizenship and Immigration Canada [CIC] advised Mr. Wong that his citizenship might be referred to the GIC for revocation. On July 16, 2012, his representative wrote to request a referral to this Court. CIC refused the request because Mr. Wong had been served with notice that CIC intended to have his citizenship revoked more than thirty days prior to his request. Mr. Wong has now made the request again. Ultimately, the GIC revoked Mr.

Wong's citizenship on April 23, 2015, but following Mr. Wong's application for judicial review, the Minister consented to an Order setting aside the GIC's decision and remitting the matter for redetermination. At the present time the Minister has written a draft report for submission to the GIC and Mr. Wong's submissions are due to be submitted shortly. Until the GIC makes a decision on Mr. Wong's citizenship, he remains a Canadian citizen.

[5] Mr. Wong filed his underlying application on September 28, 2016, the same day he filed this motion. He does not seek review of a decision. Rather, he seeks to prevent a decision being made by the GIC.

[6] Mr. Wong states that in this case the crucial issue is whether he has suffered prejudice. He says the delay in processing the citizenship revocation is ten years. There were six years from the date of his conviction for misrepresentation before the government took action on his citizenship. Prior to that, there were four years from the date of his misrepresentation to the date of his conviction for it. The evidence in the record indicates that the branch of CIC responsible for citizenship revocation was aware of Mr. Wong's misrepresentation shortly after he obtained citizenship. Mr. Wong submits that a delay of ten years in rendering a decision on his citizenship revocation is so severe that it is an abuse of process. Relying on *John Doe v Canada (Citizenship and Immigration)*, 2007 FC 327 [*John Doe*] at paragraph 12, he argues that once an abuse of process has been found to exist, it is such a serious issue that it follows there must be irreparable harm to the victim of the abuse and to the public interest, neither of which can be repaired.

[7] The Minister relies upon the recent decision of Mr. Justice Annis in *Memon v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 908 [*Memon*], both to distinguish *John Doe* and to confirm that in an application for a stay the test for irreparable harm is separate and

distinct from, and in addition to, the test for serious issue. The Minister argues that Mr. Wong has not shown with clear and convincing evidence that he will be subjected to continued abuse as a result of the delay in processing his revocation and he has not proven irreparable harm.

II. Analysis and Conclusion

[8] It is well settled that the test for a stay is that set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]: there must be a serious issue to be tried, the moving party must suffer irreparable harm if the stay is not granted and the balance of convenience must support the granting of a stay. An identical test has been set down in the immigration context in *Toth v Canada (Minister of Employment and Immigration)* (1998), 86 NR 302 (FCA).

[9] In *Memon*, Mr. Justice Annis noted that when a serious issue is founded on an abuse of process argument, there is a requirement that there be significant prejudice to an applicant at that stage as set out in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44. But, he notes at paragraph 36, that "does not exempt normal consideration of the prejudice issue for the purposes of irreparable harm". In other words, while a moving party must only show a serious issue of prejudice on the first stage of the test, its existence must be established on the balance of probabilities if the same prejudice is to serve as the irreparable harm for the second stage of the test. I agree. To roll into the serious issue test the question of irreparable harm obliterates the tripartite nature of the test. As Mr. Justice Annis explains at paragraph 37, "demonstrating a possibility of significant prejudice on the final order does not meet the requirement of demonstrating irreparable harm on the basis of a probability for the intervening period." The two tests are separate and distinct.

[10] I find on these facts the application judge is best suited to determine the important question of whether an abuse of process has taken place that is so severe that the GIC be permanently enjoined from making a decision. Without deciding at this stage whether there is a serious issue or not, this motion can be determined on the basis of the traditional test for irreparable harm. To show irreparable harm exists warranting the exceptional relief of a stay of a pending administrative decision, Mr. Wong is required to present clear and convincing evidence that establishes a probability of irreparable harm between the date of the stay and the final determination of the underlying application for judicial review.

[11] In considering whether irreparable harm exists or not, "the only issue to be decided is whether a refusal to grant the stay could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": *RJR-MacDonald* at 341.

[12] Mr. Wong alleges he will suffer irreparable harm because if a stay is not granted, he will be subjected to continuing abuse that will harm both him and the public's confidence in the fairness of the proceedings. He says this harm cannot be remedied after the fact. In other words, he raises the same argument under irreparable harm as he does for establishing a serious issue. Unlike *John Doe*, the Minister here does not admit there has been an abuse of process.

[13] Mr. Wong also argues that the case of *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 [*Parekh*], in which the Minister brought an action in this Court to declare the Parekhs had obtained Canadian citizenship by false representation or fraud or knowingly concealing material circumstances is very similar to this case. The Parekhs had pled guilty to misrepresenting their residency outside Canada for fourteen months of the four-year period prior

to their application. In that case, the impact of the delay in processing a revocation of their citizenship was that the Parekhs were unable to travel. They also suffered various other consequences including uncertainty, distress, great psychological stress as well as an adverse effect on Mr. Parekh's employment prospects.

[14] I do not find *Parekh* to be helpful in Mr. Wong's situation. The inability of the Parekhs to travel was caused by the government's refusal to issue passports to the family even though there was no action being taken to revoke their citizenship at that time. In addition, the government had misinterpreted the legislation and had refused to process the daughter's application for permanent residence on humanitarian and compassionate grounds as a result of that misinterpretation. These significant facts, which go directly to the issue of irreparable harm, are very different than in Mr. Wong's case. In *Parekh* the government directly contributed to the travel anxiety and stress by not issuing a passport.

[15] Equally important is the difference between prejudice in asking for a permanent stay of proceedings and irreparable harm in a motion for an interim stay. Under the test for abuse of process, the Court looks at both prejudice an applicant has already suffered and prejudice an applicant will suffer if the proceeding continues. By contrast, the question of irreparable harm on a stay motion goes only to harm that will arise between the commencement of the underlying application and its conclusion.

[16] In my view, a temporary stay of the pending GIC decision does nothing to resolve the issue of delay put forward by Mr. Wong. The delay will continue until the final determination of the underlying application regardless of whether or not the GIC is enjoined from making a decision pending that event. Allowing the GIC to render a decision could speed up the process:

a. If the GIC decides not to revoke Mr. Wong's citizenship, he has an answer, subject of course to possible judicial review by the Minister.

b. If the GIC determines that Mr. Wong's citizenship should be revoked, then Mr. Wong is still free to apply for judicial review of that decision in addition to pursuing the underlying application. If Mr. Wong's citizenship is revoked, he becomes a permanent resident and then if proceedings to find him inadmissible are commenced, he can seek a stay of those proceedings or any resulting removal order. In such a case there will also be other possible avenues to pursue, such as humanitarian and compassionate relief, a temporary resident permit or a pre-removal risk assessment, all of which are subject to judicial review. If Mr. Wong receives a record suspension for his 2003 and 2006 convictions, then he cannot be found inadmissible to Canada and will remain a permanent resident: *Immigration and Refugee Protection Act*, SC 2001, c 27, subs 36(3)(b) [*IRPA*].

c. If the underlying application is determined before the GIC renders a decision, then it may be that the GIC decision is overtaken by the judicial review and is permanently enjoined.

[17] Granting a temporary stay of the GIC decision clearly will not alleviate the delay.

[18] Mr. Wong has also raised, under the serious issue branch of the test, other prejudices he has suffered and will continue to suffer if a stay is not granted. These include: (1) he is restricted from travelling; (2) by now, he could have lost and then regained his citizenship; (3) legislative changes over the last decade have put him in a worse position—there is now a ten-year bar to re-apply for citizenship after revocation and Mr. Wong's conviction would now preclude him from

appealing a removal order to the Immigration Appeal Division, where a stay of removal can be ordered on humanitarian and compassionate grounds; and (4) the uncertainty regarding his future citizenship has created psychological harm.

[19] Of these possible harms, the second is speculative and the third concern arises not directly from the process but rather from legislative changes. The legislative changes only impact Mr. Wong if, after all avenues are exhausted, he loses his citizenship. Irreparable harm is not to be based on either speculation or a series of possibilities. Moreover, *RJR-MacDonald* is clear that irreparable harm is harm that arises if a stay is not granted but the moving party succeeds on the underlying application. If Mr. Wong receives a permanent stay of the revocation proceedings, then he will remain a citizen indefinitely and cannot be found inadmissible to Canada. Therefore, these potential harms are not irreparable.

[20] With respect to the fourth possible harm, of psychological stress, the root cause of the harm is said to be the delay and uncertainty regarding his citizenship status. As is the case with the abuse of process argument, granting an interim stay will not remedy that stress or anxiety; only a final determination will give Mr. Wong the answer he seeks.

[21] Mr. Wong has raised his inability to travel outside of Canada as a form of psychological harm. There is no evidence that as a citizen, which is Mr. Wong's current status, he is precluded from travelling outside Canada. I will not comment on the psychological report he submitted, as to do so is unnecessary for this motion and the issue of irreparable harm. Much of Mr. Wong's anxiety and his allegations of significant prejudice to him revolve around his self-imposed refusal to travel outside of Canada because he believed his citizenship could be revoked. Mr. Wong is directly responsible for his own actions. The advice Mr. Wong received at the time of

his conviction for making a misrepresentation on his citizenship application was given to him by his own counsel. Mr. Wong took no steps to verify the information he received or to follow up over the years to understand whether travel was permissible. In my view, the cause of the stresses in Mr. Wong's life related to travel emanate from his own actions; they do not arise directly from the period of delay in processing his citizenship application.

[22] Mr. Wong also has not shown that irreparable harm will occur to him prior to the resolution of the underlying application or that a refusal to grant the temporary stay is required to prevent an irreparable harm. If Mr. Wong does travel and his citizenship is revoked while abroad, he will still have the right to re-enter Canada as a permanent resident unless and until a removal order is made against him by the Immigration Division: *IRPA*, ss 2(1), 19(2), 27(1), 31(3), 44, 45, 46(1)(c), 46(2)(a).

[23] In conclusion, I am not convinced that Mr. Wong has shown he suffers from any harm that will deteriorate further between now and the final determination of the judicial review hearing such that he should be granted the exceptional relief he seeks.

ORDER

THIS COURT ORDERS that the motion is dismissed.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1662-16
STYLE OF CAUSE:	YU CHUN ANTHONY WONG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 4, 2016
ORDER AND REASONS:	ELLIOTT J.
DATED:	OCTOBER 19, 2016

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